

**Letter of Findings: 04-20110201P
Gross Retail Tax
For the Years 2008 and 2009**

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ISSUE

I. Gross Retail Tax – Negligence Penalty.

Authority: IC § 6-2.5-1-18; IC § 6-8.1-10-2.1; IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2](#); Sales Tax Information Bulletin 48 (July 1984); Sales Tax Information Bulletin 48 (August 2008).

Taxpayer asks that the Department of Revenue exercise its authority to abate the negligence penalty imposed following a sales and use tax audit.

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant that sells a variety of indoor and outdoor recreation and leisure equipment. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer's business records. The audit resulted in the assessment of additional tax; Taxpayer was also assessed a ten-percent negligence penalty. Taxpayer disagreed with the penalty assessment and submitted a protest to that effect. An administrative hearing was conducted and this Letter of Findings results.

I. Gross Retail Tax – Negligence Penalty.

DISCUSSION

The audit found that Taxpayer sold "hot tubs" without collecting sales tax. As explained in the audit report, "Taxpayer made sales of hot tubs and accepted either a doctors' prescription or a note from a chiropractor or physical therapist attesting to therapeutic necessity of the unit." The audit cited to IC § 6-2.5-1-18 for the premise that Taxpayer's sales of hot tubs were not exempt from sales tax. The statute cited states in full:

(a) "Durable medical equipment" means equipment, including repair and replacement parts for the equipment, that:

- (1) can withstand repeated use;
- (2) is primarily and customarily used to serve a medical purpose;
- (3) generally is not useful to a person in the absence of illness or injury; and
- (4) is not worn in or on the body.

The term does not include mobility enhancing equipment.

(b) As used in this section, "repair and replacement parts" includes all components or attachments used in conjunction with durable medical equipment. (Emphasis added).

Taxpayer does not challenge the audit's conclusion that sales of hot tubs were taxable. However Taxpayer explains that it had "reasonable cause" for failing to charge its customers sales and use tax. Taxpayer states in part:

We did not realize the exemption was taken away, nor was any notice given to our store, corporate headquarters or any number of the medical community who continued to write prescriptions for hot tubs and told their clients they were tax exempt. We would have complied immediately had notice been sent when the law went into effect.

Thus, Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty.

The Department notes that penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides in relevant part:

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In Taxpayer's case, the audit notes the following:

Indiana exempts prescriptions of medical equipment via [45 IAC 2.2-5-27](#); however [IC 6-2.5-1-18](#) no longer considers hot tubs to be medical equipment. The citation states that durable medical equipment does not include equipment that "is generally not useful to a person in the absence of an illness or injury."

The applicable Information Bulletin, Sales Tax Information Bulletin 48, had been in place for over two decades (it was replaced in August of 2008). The 1984 version of Sales Tax Information Bulletin 48 (July 1984), 7 Ind. Reg. 2438, states in part:

(6) Sales of other medical equipment, etc., which are directly required to correct or alleviate injury to, malfunction of, or removal of a portion of the human body.

The updated version, Sales Tax Information Bulletin 48 (August 2008), 20080827 Ind. Reg. 045080661NRA, states in relevant part:

(6) Sales of durable medical equipment that can stand repeated use, is primarily used to serve a medical purpose, is generally not useful to a person in the absence of an illness or injury, and is not worn in or on the body, and that is directly required to correct or alleviate injury to, malfunction of, or removal of a portion of the human body; []

(Emphasis added).

Based upon the particular facts and circumstances of Taxpayer's case, the Department finds that Taxpayer has met the requirements of [45 IAC 15-11-2](#). Thus the penalty should be waived.

FINDING

Taxpayer's protest of the penalty is sustained.

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